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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1092

SHELBY FRANKLIN AND DOROTHY FRANKLIN,
Petitioners,

vs.

MARLIN K. McDANIEL,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

SHELBY FRANKLIN,
446 N. 14 Street,
New Castle, Indiana,
Pro Se.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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PETITION FOR WRIT OF CERTIORARI.

(a) A reference to the official reports of opinion delivered in the courts below, December 20, 1966.

(b) A concise statement of the grounds on which the jurisdiction of this court is invoked, is the asking for a common law writ of certiorari under 28 U. S. C. 1651.

(i) The date of the judgment sought to be reviewed and the time of its entry: is December 20, 1966.

(ii) There was no petition for a rehearing filed, due to the facts the court did not hear us on our briefs and argument for Plaintiffs-Appellants, when the Hon. John S. Hastings, Chief Judge, ordered that this appeal be submitted to the court on the record and brief for Plaintiff-Appellant, without oral argument, on Tuesday, December 6, 1966.

(iii) Art. 3. 2. Constitution of the United States.

2. Extent of Judicial Powers—Supreme Court—trial and places of trial.—[1.] The Judicial power shall extend to all cases, in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made, under their authority:—to all cases affecting Ambassadors, other Public Ministers and Consuls;—to all cases of Admiralty and Maritime Jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States; —between citizens of different states;—between citizens of the same state claiming lands under grants of different states; and between a state or the citizens thereof.

(c) The questions presented for review.

1. Whether: We the Plaintiffs are entitled to a Default Judgment when the Court has ruled the Defendant-Appellee is in Default.

2. Whether the Fourteenth Amendment to the Federal Constitution does confer jurisdiction on The United States District Court to try and determine actions arising under the Constitution of the United States the Fourteenth Amendment to the Constitution of the United States.

(d) The Constitution provisions, is Amendment 14.

1. Citizenship—Due process of law—Equal protection—all persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of The United States.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of The United States; nor shall any state deprive any person of Life, Liberty, or Property, without due process of law:

(e) A concise statement of the case containing facts material to the consideration of the questions presented.

We, the Plaintiffs, filed our complaint March 28, 1966. A summons was issued by the clerk of the United States District Court captioned as cause No. 1P-66-C-169. Pursuant to Rule 4: Process in the language of Form 1, United States District Court Civil Procedure.

Which reads as follows:

To the above named Defendant:

You are hereby summoned and required to serve upon Shelby Franklin, Plaintiff's Attorney, whose address is 446 North 14th Street, New Castle, Indiana, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you exclusive of the day of service. If you fail to do so; Judgment by Default will be taken against you for the relief demanded in the complaint.

There was a request filed with the clerk Pursuant to Rule 55.

Default. (a) Entry. (b) Judgment. Judgment by Default may be entered as follows:

(1) By the clerk.
(2) By the court in all other cases.

We did not apply to the court for judgment under Rule 55. (2) We requested a Default Judgment under 55. (1) The court intervened where they had no authority and dismissed the complaint.

(g) If the review of the judgment of a Federal Court is sought, the statement of the case shall also show the basis for Federal Jurisdiction in the court of the first instance.

The Jurisdiction of the Court in the first instance was: the action arises under The Constitution of The United

States. The Fourteenth Amendment to The Constitution of The United States, and United States District Court—Civil Procedure:

Rule 11.

Rule 17 and 18 (b).

Rule 21.

United States District Courts—Civil Procedure Forms 1 and Form 13.

(h) A direct and concise argument amplifying the reasons relied on for the allowance of the writ pursuant to Rule 19. (b) The Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter: The Sixth Circuit Court of Appeals said These rules has the Force and affect of Statute in capacity to Sue and be Sued.

Under Civil Procedure—District Courts. Rule 17. *American Federation of Musicians* v. *Stein* (Ca6), 213F(2d)679. The Seventh Circuit Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this court: and has so far departed from the accepted and usual course of Judicial Proceedings, and so far sanctioned such a departure by a Lower Court, as to call for an exercise of this Court's power of supervision.

(i) Herewith appended to the petition are copies of the two opinions delivered by the reviewing court.

Wherefore: Petitioners pray an order granting a Writ of Certiorari.

SHELBY FRANKLIN,
446 N. 14 Street,
New Castle, Indiana,
Pro Se.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 15763 September Term and Session 1966.

SHELBY FRANKLIN AND DOROTHY FRANKLIN,
Plaintiffs-Appellants,
vs.
MARLIN K. MCDANIEL,
Defendant- Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

December 20, 1966

Before DUFFY, *Senior Circuit Judge,* KNOCH and CASTLE, *Circuit Judges.*

Per Curiam. Plaintiffs filed a complaint "to set aside a fraudulent conveyance under Rule 18(b)." Jurisdiction was claimed under the Fourteenth Amendment to the Constitution of the United States. The complaint prayed that a conveyance of real estate from defendant McDaniel to Gerald L. Hunt and Ma ilyn A. Hunt be declared void.

Personal service was had on defendant on April 1, 1966. Defendant did not appear or answer and is in default. The District Court held it had no jurisdiction of the alleged claim pointing out that the Fourteenth Amendment to the federal Constitution does not confer jurisdiction on the

United States District Courts to try and determine ordinary civil actions. *Ream* v. *Handley*, 7 Cir., 359 F. 2d 728, 730 (1966). The Court noted that diversity of citizenship was lacking.

The District Court was correct in ordering a dismissal of this suit. The order of dismissal is

AFFIRMED.

UNITED STATES DISTRICT COURT,
Southern District of Indiana,
Indianapolis Division.

SHELBY FRANKLIN AND DOROTHY FRANKLIN,
Plaintiffs,
vs.
MARLIN K. McDANIEL,
Defendant.
No. IP 66-C-169.

MEMORANDUM OPINION.

Plaintiffs filed their complaint herein on March 28, 1966, and personal service was had on the defendant on April 1, 1966. The defendant has failed to enter his appearance or file a responsive pleading within twenty days of such last mentioned date, and the plaintiffs have filed motion for judgment by default, pursuant to Rule 55 of the Federal Rules of Civil Procedure.

Before plaintiff's motion may be considered, it is necessary for us to determine whether or not we have jurisdiction over the subject matter of their action. It is obvious that jurisdiction is not founded upon diversity of citizenship, since the plaintiffs and the defendant all appear to be citizens of the State of Indiana. Jurisdiction, if it exists, must therefore be predicated upon the existence of a cause of action arising under the Constitution or laws of the United States. Title 28 U. S. C. § 1331.

The complaint charges the defendant with executing a deed conveying real estate belonging to plaintiffs to Gerald L. Hunt and Marilyn A. Hunt for the purpose of defrauding the plaintiffs, and without consideration. They demand that "plaintiffs have judgment against defendant," al-

though they fail to set out what kind of a judgment they seek as against Marlin K. McDaniel, and they further pray "that the aforesaid conveyance to Gerald L. Hunt and Marilyn A. Hunt be declared void." It is apparent that no court would have jurisdiction to grant this latter prayer unless the Hunts were made parties defendant.

It affirmatively appears from the exhibit attached to the plaintiffs' complaint that the sole defendant, Marlin K. McDaniel, executed the deed in question in the fiduciary capacity of Commissioner appointed by order of the Wayne Superior Court of Wayne County, Indiana, in a certain cause of action in which the said Gerald L. Hunt and Marilyn A. Hunt were plaintiffs, and the said Shelby Franklin and Dorothy Franklin were defendants. The approval of the special judge who tried said cause of action is endorsed upon the deed. There would, therefore, appear to be a serious question as to whether plaintiffs have stated facts sufficient to constitute a cause of action against the defendant McDaniel.

It is not necessary for us to consider such question, however, since it is plain that this Court does not have jurisdiction over the subject matter of the action.

The plaintiffs attempt to postulate the jurisdiction of this Court upon the Fourteenth Amendment, by alleging that the defendant has deprived them of their rights in the property involved without due process of law. We recently held in the case of *Ream* v. *Handley, et al.*, affirmed by the Seventh Circuit Court of Appeals on April 20, 1966, ... F. 2d ..... that the Fourteenth Amendment does not confer jurisdiction on United States District Courts to try and determine ordinary civil actions. If the particular action is recognized by the courts of the state in which the action arises, then the sole jurisdiction to try and determine such case is in the state courts, absent diversity of citizenship.

An action for fraud is one recognized by the courts of Indiana. Therefore, no jurisdiction exists in this court to entertain plaintiffs' action. It follows that the same should be, and it is hereby Dismissed, at plaintiffs' cost.

S. HUGH DILLIN,
Judge, United States District Court.

CC: Shelby Franklin and Dorothy Franklin, 446 N. 14th Street, New Castle, Indiana.

Marlin K. McDaniel, 34 South 7th Street, Richmond, Indiana.